DR. BENJAMIN GEORGE & 3 ORS.

v.

MAJLIS PERBANDARAN AMPANG JAYA & 2 OTHER CASES

HIGH COURT MALAYA, SHAH ALAM
DATO' FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO. 25-42-94]
3 OCTOBER 1995

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for - To quash notices issued by local authority - Notice to repair or demolish building - Street, Drainage and Building Act 1974, s. 83 - Whether certiorari available.*

ADMINISTRATIVE LAW: *Certiorari - Application for - Whether existence of statutory appeal provision precludes leave for certiorari - Street, Drainage and Building Act 1974 - Whether ss. 83(3), (6) and 92 are genuine statutory appeal provisions.*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local authority - Discretion - Whether properly exercised - Judicial considerations - Whether relevant to scope, policy, and object of empowering Act - Whether recommendations of inquiry committee considered - Whether adequate weight given to relevant factors - Whether unreasonable - Whether compliance amounts to a trespass - Legitimate expectation - Whether an inconsistent and unfair exercise of discretionary power - Whether express and implied limitations on statutory discretion complied with.*

PUBLIC AUTHORITIES: *Local Authority - Discretionary power - Notices ordering repair or demolition of buildings - Who can be issued with s. 83 notices - Definition of owner - Street, Drainage and Building Act 1974, s. 3 - Whether notices ultra vires.*

These three suits were in respect of applications for an order for *certiorari* to quash the notices that were issued to the applicants under s. 83(1) of the Street, Drainage and Building Act 1974 ('the Act') by the Majlis Perbandaran Ampang Jaya ('the respondent'). The applicants were Highland Properties Sdn. Bhd., the developer of the Highland Towers Condominium ('HTC'); former residents of HTC; and purchasers of certain units of HTC.

Following the tragic collapse of Block 1 of HTC, the respondent issued the s. 83 notices to the applicants ordering them to either repair or demolish Blocks 2 and 3 of HTC within three months from the date of the notices, failing which the respondent would effect the necessary repairs or demolition and bill the applicants accordingly. The notices were issued following the *Report of the*

Inquiry Committee into the Collapse of Block 1 and the Stability of Blocks 2 and 3 of the Highland Towers Condominium, which recommended, *inter alia*, that the owners of HTC obtain a rectification proposal from independent consultants within three months from a date of notification by the respondent, failing which the respondent would then issue a notice to the owners to demolish Blocks 2 and 3 of HTC.

The respondent opposed the applications on the following grounds: (i) that it had the jurisdiction under s 83 of the Act to issue the said notices; (ii) that the notices were not amenable to *certiorari* as the Act provides an alternative statutory appeal procedure; (iii) that in issuing the notices it had complied with the principles of natural justice and had not acted arbitrarily, improperly, or *mala fide*; and (iv) that the notices were not in breach of arts. 8 and 13 of the Federal Constitution.

The applicants submitted a three-pronged argument which centred primarily on the issues of timing, ownership, and trespass.

Held:

[1] A statutory appeal procedure only exists if an individual is provided with the opportunity to seek a reconsideration of an original decision-maker's decision at a higher authority or tribunal. There can be no appeal procedure if the recipient of an illegal s. 83 notice must submit himself to the mercy of the party issuing the notice in the hope that the notice will be withdrawn. Section 83(3) and (6) do not provide a mechanism to challenge the validity of notices issued under s. 83(1) of the Act; it was clear that they did not provide the applicants with an alternative statutory appeal procedure in preference to *certiorari*. Both s. 83(3) and (6) are operationally dependent on the validity of the notices issued under s. 83(1) of the Act; if the notices issued under s. 83(1) are invalid, there can be no resort to s. 83(3) and (6) of the Act.

[2] Furthermore, the right of appeal embodied in s. 92 of the Act arises only against a mandatory order made by a Magistrate's Court, and not against a notice issued by a local authority under s. 83(1) of the Act. The statutory appeal procedure provided by s. 92 is totally dependent on the respondent seeking a mandatory order under s. 91 to enforce the notices issued under s. 83(1) of the Act. A statutory appeal procedure cannot be a genuine appeal procedure if it is first dependent on a decision-maker seeking to enforce his original decision.

[3] The existence of an elaborate appeal provision in the law concerned is not a conclusive ground for refusing leave for an order for *certiorari*.

[4] It is well-established that a discretionary power 'to impose such conditions as they think fit' must be exercised in good faith, for a proper

purpose, and after a consideration of all factors relevant to the scope, policy, and object of the empowering Act.

[5] The respondent had failed to consider the recommendations of its own Inquiry Committee, and this had led it to issue the said notices which were contrary to the scope, policy, and object of s. 83 of the Act. The Inquiry Committee recommended that the owners of HTC submit a rectification proposal within three months. It did not recommend that repairs or demolition be completed within three months. A responsible local authority, with a proper appreciation of its responsibilities, would have studied the recommendations of the Inquiry Committee and would not have departed from them unless there was good reason to do so.

[6] The respondent had not given adequate weight to the responsibility of the owners of the hill-slope to advert the greater danger it poses to Blocks 2 and 3 of HTC. In this respect, 'unreasonableness' can be used to set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance or has given excessive weight to a factor of no great importance.

[7] It was impossible to comply with the s. 83 notices not only because they were unreasonable for being irrational to expect the applicants to rectify the neighbouring apartments and the hill-slope which they do not own, but also for expecting the applicants to commit a trespass which is an illegality. The respondent's decision to issue the notices was so unreasonable or perverse that it was one that no reasonable body could have come to.

[8] The s. 83 notices issued were beyond the powers conferred by the Act as they required the applicants to trespass on neighbouring property to conduct rectification work. There is neither any power in s. 83 of the Act that allows a local authority to order an individual to conduct work on property not belonging to him, nor any power to order him to trespass on neighbouring property. The express words of s. 83(1) and (3) of the Act require a building owner to be given a rational choice of either repairing or demolishing his building; there can be no rational choice where the danger to the building emanates from beyond the building's boundaries.

[9] The residents of HTC had a legitimate expectation that the recommendations of the Inquiry Committee would be followed by the respondent in issuing the s. 83 notices. The failure of the respondent to do this must mean that the notices were issued *ultra vires* and beyond the jurisdiction conferred by the Act.

[10] A s. 83 notice can only be directed to an 'owner' of a building. The purchasers of units of HTC and the former residents of HTC are not

owners of HTC within the definition of s. 3 of the Act. Only Highland Properties Sdn Bhd, being the registered proprietor of the land on which Blocks 2 and 3 of HTC stand, could be served with a valid s. 83 notice. Therefore, the respondent had exceeded the jurisdiction of s. 83 of the Act by issuing the notices to the applicants who were former residents or purchasers of units of HTC.

[11] Section 120(3) of the Act cannot confer jurisdiction upon a local authority to issue s. 83 notices to occupiers of buildings where s. 83 of the Act itself does not confer that jurisdiction. Section 120(3) only deals with the manner of service of notices issued under the Act.

[12] The former residents and the purchasers of units of HTC had taken loans from various financial institutions and had assigned their rights, titles, and interests under their sale and purchase agreements to these financial institutions. The fact that the respondent did not serve these institutions with s. 83 notices pointed to an inconsistent and unfair exercise of discretionary power, underlining the assertion that the said notices were *ultra vires* and beyond the jurisdiction of s. 83 of the Act.

[13] By issuing the s. 83 notices to only some and not to all of the apartment 'owners' of HTC, the respondent had violated art 8(1) of the Federal Constitution.

[14] If a local authority seeks to issue or enforce a s. 83 notice that fails to comply with the express or implied limitations on the statutory discretion in s. 83 of the Act, then its actions will violate art 13(1) of the Federal Constitution, and be *ultra vires* and beyond the jurisdiction of the Act. In the instant case, the respondent had clearly failed to comply with the express and implied requirements of s. 83 of the Act.

[Applications allowed. Order for certiorari granted to all applicants.]

Cases referred to:

Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1983] 2 CLJ 7; [1983] 2 MLJ 54 ***(refd)***

Pengarah Tanah & Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135 ***(foll)***

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1947] 2 All ER 680 ***(cit)***

Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government

Fawcett Properties Ltd. v. Buckingham County Council

Minister of Labour, Malaysia v. Lee Seng Fatt [1990] 1 CLJ 1103; [1990] 2 MLJ 82 ***(cit)***

Padfield v. Minister of Agriculture, Fisheries & Food [1968] 2 WLR 924 ***(cit)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748; [1995] 2 AMR 1601 ***(cit)***

Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis [1995] 1 AMR 15; [1995] 1 MLJ 308

Minister for Aboriginal Affairs & Anor. v. Peko-Wallsend Ltd. & Ors. [1986] 162 CLR 24 ***(foll)***
Government of Malaysia v. Jagdish Singh [1987] CLJ 451; [1987] 2 MLJ 185 ***(refd)***
HSBC Corp v. Rent Tribunal for Ulu Kinta [1972] 1 MLJ 70 ***(refd)***
Badat Drani v. Tan Kheat [1953] MLJ 67 ***(refd)***
Reg v. Chief Constable, ex p Calveley [1986] 2 WLR 144 ***(refd)***
Hj Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85 ***(foll)***
Taveli & Ors. v. Minister of Immigration [1986] 86 ALR 435 ***(cit)***
Attorney General of Hong Kong v. Ng Yuen Shin [1983] 2 WLR 735
Dr. Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 3 MLJ 298 ***(refd)***
Kuching Plaza Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd. [1991] 3 MLJ 163 ***(refd)***
Chung Khiaw Bank Ltd. v. Hipparion (M) Sdn. Bhd. [1988] 1 CLJ 164; [1988] 2 MLJ 62 ***(refd)***
HTY Ltd. v. Vince Commission [1976] 1 CR 169 ***(refd)***
Shri Ram Krishna Dalmia & Ors. v. Shri Justice SR Tendolkar & Ors. AIR 1961 SC 1602 ***(refd)***
Datuk Hj. Harun Hj. Idris v. PP [1977] 2 MLJ 155 ***(refd)***
Public Prosecutor v. Khong Teng Khen
Arumugam Pillai v. Government of Malaya [1975] 2 MLJ 29 ***(refd)***
Government of Malaya & Anor. v. Selangor Pilot Association [1977] 1 MLJ 133 ***(refd)***

Legislation referred to:
Control of Rent Act 1966
Federal Constitution, arts 8(1), 13(1), (2)
National Land Code 1965, ss. 206(3), 340
Police (Discipline) Regulations 1977
Rules of the High Court 1980, O. 53 r. 1A
Strata Titles Act 1985, s. 34(b), 39, 42, 43(g), 52
Street, Drainage and Building Act 1974, ss. 3, 83(1), (3), (4), (6), (8), 88, 91(1), 92(1), 120(3)

Other sources referred to:
Administrative Law of Malaysia & Singapore, MP Jain, 2nd Edn, pp. 223, 338, 356, 460, 461
Applications for Judicial Review, Law & Practice of the Crown Office, Grahame Aldous & John Alder LLB, BCL, 2nd Edn.
Administrative Law, Professor HWR Wade, 6th Edn., p 388,
Constitutional Law in Malaysia & Singapore, Kevin Tan, Yeo Tiong Min & Lee Kiat Seng

OM No. 25-42-94
For the applicants - W.S.W. Davidson (Y. Ramachandran with him); M/s. Azman Davidson & Co.
For the respondent - Ibrahim bin Hashim (Faidz bin Mohd. Darus with him); M/s. Faidz Darus & Nik Rahman

OM No. 25-39-94
For the applicant - Darryl S.C. Goon; M/s. Raja, Darryl & Loh
For the respondent - Ibrahim bin Hashim (Faidz bin Mohd. Darus with him); M/s. Faidz Darus & Nik Rahman

OM No. 25-41-94

For the applicant - Jerry Y.T. Ling; M/s. Lee, Ling & Partners

For the respondent - Ibrahim bin Hashim (Faidz bin Mohd. Darus with him) M/s. Faidz Darus & Nik Rahman

For the Government of Selangor (watching brief) - Mohd. Nasir bin Yahya, State Legal Adviser's Chamber

JUDGMENT

Faiza Tamby Chik J:

Before me today are 3 notices of originating motion. They are numbered as suits no. 25-39-94, 25-41-94 and 25-42-94. All these three suits are to be heard together simultaneously on the order of the Court dated 14 October 1994. All these three suits are concerned with notices issued pursuant to s. 83 of the Street, Drainage and Building Act 1974 ("the Act").

All the applicants in these notices of originating motion are recipients of notices issued by the Majlis Perbandaran Ampang Jaya pursuant to s. 83 of the Act (the said notice) ordering the repair or demolition of Blocks 2 and 3 of Highland Towers, situated in Hulu Klang, Selangor Darul Ehsan.

The applicants are Highland Properties Sdn. Bhd., the developer of a high-rised apartments project known as "the Highland Towers Condominium" Hulu Klang ('the Highland Towers') who was issued with the said notice on 6 July 1994. Their suit number is 25-39-94. Yap Kim Kee & Sons Sdn. Bhd., a purchaser of one of the condominium units in Block 3 of the Highland Towers was issued with the said notice on 6 July 1994. Their suit number is 25-41-94. Dr. Benjamin George, Dato Alladin Hashim, Chan Keng Fook and Sharifah Azaliah binte Tan Sri Syed Omar Shahabudin were former residents (except Sharifah Azaliah who is a purchaser of one of the condominium units in Block 3) of the Highland Towers who were issued with the said notices on 11 July 1994, 12 July 1994 respectively. Their suit number is 25-42-94.

The respondent is Majlis Perbandaran Ampang Jaya (MPAJ). The Highland Towers is situated within the jurisdiction of the MPAJ.

In the said notice the respondent stated:

> Take notice that after conducting an inquiry under s. 83 of the Street, Drainage and Building Act 1974 (Act 133), Majlis Perbandaran Ampang Jaya is satisfied that Blocks 2 and 3 of Highland Towers Condominium Hulu Klang, Selangor are dangerous to any person to remain or reside inside the said building based on the following grounds:
>
> a) The stability check for the factor of safety against sliding and overturning on the rubble wall in front of Block 3 is theoretically less than 1.0 which indicates that the rubble wall is unstable. Any loss of lateral restrain in the event of collapse of the rubble wall can induce a failure similar to Block

1, even in the absence of landslide occurring behind the block, Block 2 will be significantly affected because of its proximity to Block 3.

b) The surface drainage system on the hillslope behind Blocks 2 and 3 has not been constructed in full compliance with the approved plan and not maintained accordingly by the developer/owner. Any increase in infiltration of overland flow including flow from the adjoining development area can cause a rise of ground water level under the same surface and subsurface permeability characteristics which can induce the same result as that which affected Block 1.

c) The foundation of Blocks 2 and 3 might suffer the same inherent weaknesses as those experienced in Block 1 as the piling system for Blocks 2 and 3 is inferred to be the same as for Block 1. The foundation system of Block 1 has shown weaknesses in terms of the following:

i) The pile system was proposed by the piling contractor and was not verified by the consultant engineer.

ii) No proof of load tests was available to confirm the design.

iii) The quality control of the welding was suspect since it was discovered that some of the weldings done were not in accordance with the requirements of the specialist contractor's normal practice for welding of rail piles.

iv) The use of old rails as pile foundations lends itself to criticism, since old rails are of unknown strength characteristics.

d) The planning, construction and supervision of the development of Blocks 2 and 3 were similar to those for Block 1. As there were irregularities in the submission, construction and supervision procedures related to the collapse of Block 1, it is inferred that the safety of Blocks 2 and 3 is also doubtful.

You are hereby required to repair the defects of the said building or to demolish them or anything affixed thereon within three (3 months) from the date of this notice.

Take notice that if you fail to comply with the requirements of this notice, Majlis Perbandaran Ampang Jaya (MPAJ) may do any or all of the acts required by the notice and you shall pay MPAJ all expenses reasonably incurred in carrying out the terms of the notice.

Dated this 11 July 1994.

Sgd.
Setiausaha
Majlis Perbandaran Ampang Jaya.

Background of the Case

The applicants in Suits No. 25-39-94, 25-41-94 and 25-42-94 obtained leave to seek an order of *certiorari* on 30 August 1994, 22 September 1994 and 5 September 1994 respectively. Their applications came up for hearing on 14 October 1994 when the Court ordered that all the three suits are to be heard together. These applications came up for hearing again on 28 November 1994 when a postponement was granted to enable the parties to hold a dialogue. When the Court sat again on 28 March 1995 to hear the applications, a further adjournment was granted to all the parties to discuss a technical report prepared by the applicants' engineering consultants, Minconsult Sdn. Bhd., as part of their dialogue. The applications were fixed for hearing on 29 June 1995 to enable adequate time for the proposed dialogue to bear fruit. From the affidavit of Michael Patrick Rickard affirmed on 23 June 1995, it is apparent that the applicants had urged the respondent to host the proposed dialogue at an early date, well before the new hearing date of 29 June 1995. (See Exhibits "MPR3", "MPR4" and "MPR5"). However, the respondent could only host this dialogue on 12 June 1995. The meeting on 12 June 1995 was attended by representatives of the applicants, Highland Properties Sdn. Bhd., and the representatives of one adjoining landowner. Although this meeting provided the various parties with some traction for moving forward it was inconclusive and further negotiations will be needed before the fate of Blocks 2 and 3 can be resolved.

From the affidavit of Dr. Benjamin George affirmed on 22 August 1994, it is stated that on 20 July 1994, 2 August 1994 and 10 August 1994, the solicitors for the residents of Highland Towers wrote to the respondent pointing out the flaws in the s. 83 notices (see Exhibits "BG9" and "BG10"). The only reply received in response to these letters was a note that the questions raised in these letters would be considered. The note which is Exhibit P1 stated:

> Majlis Perbandaran Ampang Jaya
> No. 6, 7 & 8, Jalan Ampang Utama 1/1
> 68000 Ampang, Selangor Darul Ehsan.
>
> Ruj. Tuan: WSWD/MM/YR/bk/521/93P
> Ruj. Kami: (73) dlm. MPAJ. 09/52/2 Jld. 1
>
> Tarikh: 16 Ogos 1994
>
> Azman, Davidson & Co,
> Peguambela & Peguamcara,
> Suite 13.03,
> 13th Floor,
> Menara Tan & Tan,
> 207, Jalan Tun Razak,
> 50400 Kuala Lumpur.

Tuan,

Notice to Rectify Blocks 2 and 3 Highland Towers Condominium Hulu Klang, Selangor.

Saya dengan hormatnya merujuk kepada perkara di atas dan surat tuan bertarikh 20 Julai, 1994 dan 2 Ogos 1994.

2. Berhubungan dengan perenggan 2 surat bertarikh 20 Julai 1994, pihak Majlis telah mengemukakan perkara tersebut kepada Y.B. Penasihat Undang-Undang Negeri Selangor untuk jawapan dan nasihat beliau.

Sekian untuk makluman. Terima kasih.

"Berbakti, Bersih, Berbudaya"

Saya yang menurut perintah,

Sgd.

(Johari bin Atli)
Pegawai Undang-Undang,
b/p: Yang Dipertua

Majlis Perbandaran Ampang Jaya.
s.k. - Yang Dipertua Majlis perbandaran Ampang Jaya.

Therefore it could be seen that in the absence of any clear offer by the respondent to discuss the legality of its s. 83 notices the residents had no option but to apply to this Court for relief *via* the avenue of O. 53 of the Rules of the High Court 1980 (RHC). It should be noted that O. 53 r. 1A of the RHC requires that an application for *certiorari* be made within six weeks of a decision to be challenged being made. (See *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour & Manpower & Anor.* [1983] 2 MLJ 54, 57 FC). There was no definitive response from the respondent to withdraw the s. 83 notices before the expiry of six weeks from the date of issue of these notices. In the light of this fact, the residents of Highland Towers could not risk losing their rights under O. 53 and had no option but to seek relief from this Court before the expiry of six weeks from the date of issue of the s. 83 notices. The residents of Highland Towers have actively sought a solution to the Highland Towers problem by providing various parties, including the respondent with copies of an engineering report prepared by their consultants on the work required to be done to save Blocks 2 and 3 (see the affidavit of Dr. Benjamin George affirmed on 24 March 1995 where the report is annexed as Exhibit "BG1"). A meeting was held at the respondent's headquarters with various parties to discuss this engineering report. This meeting proved to be inconclusive and yielded no solutions. (See paras. 3, 4 and 5 in the affidavit of Michael Patrick Rickard affirmed on 23 June 1995). The residents' solicitors wrote to the respondent on 23 June 1995 requesting the respondent to host another meeting to discuss various engineering proposals suggested by the residents'

experts. (See Exhibit "MPR6" in the aforementioned affidavit of Michael Patrick Rickard). The respondent had not responded to the request in this letter. This lack of enthusiasm by the respondent reinforced the view that the residents of Highland Towers had no option but to approach this Court for relief before the expiry of the time period set out in O. 53 of the RHC.

When the Court sat for hearing on 29 June 1995, I agreed to the suggestion made by learned Counsel for the respondent that the various parties should submit written submissions prior to presenting their final oral submissions on 12 September 1995. On 12 September 1995 learned Counsel for the various parties made their oral submissions.

It should be noted at the outset that the technical committee of investigation on the collapse of Block 1 and the stability of Blocks 2 and 3 Highland Towers had made its report on 15 April 1994 and reached certain conclusions and made certain recommendations. The said report stated,

> In the planning, construction and supervision of the project, the developer and consultants respectively, did not follow the due approved process required. This has led to the collapse of Block 1. As the remaining Blocks 2 and 3 were constructed and supervised in the same manner as that of Block 1, it is inferred that the safety of these Blocks in their present condition is doubtful, rendering them unsafe.
>
> The following points were noted for considerations on the stability of Blocks 2 and 3.
>
> a. Superstructure integrity of Blocks 2 and 3 is unaffected by the collapse of Block 1.
>
> b. Foundation integrity is suspect, where quality control of weldings were not done in accordance with the requirements of the specialist contractor's normal practice. The use of old rails as pile foundation are of unknown strength characteristics and low ductility property of the pile section.
>
> c. Retaining wall integrity is suspect, especially where signs of distress are apparent on the front and back of retaining wall of Block 3.
>
> d. Surface drainage behind Blocks 2 and 3 is inadequate.
>
> (See paras. 149 and 150).

Therefore,

> The committee is of the opinion that major rectification works are required for Blocks 2 and 3. Any remedial works by the developer must be designed and supervised by professional engineers to include the followings:
>
> a. The front and back retaining walls must be redesigned and reconstructed. An adequate drainage system must be provided on the hillslope behind Blocks 2 and 3.

b. The foundation system of Blocks 2 and 3 requires strengthening.

c. Provision of surface drains must be reviewed to cater for the upslope developments.

d. Regular maintenance of surface drains and monitoring of slope movements must be instituted.

(See para. 151).

The residents of Highland Towers have also engaged Minconsult Sdn. Bhd., an engineering firm to report on the current condition of Blocks 2 and 3 of Highland Towers and their adjoining areas. The Minconsult report was completed in March 1995 and presented the findings of the condition assessment study with regard to the building structure, foundation, retaining structures close to the blocks as well as on the hillslopes, the stability of the hillslopes and the hydrological aspects surrounding the development. Based on their study, Minconsult drew the following conclusions:

> The basement slab of Block 3 was found to have cracked and subsided at several locations. The ground beneath the slab was also found to have subsided by more than 500 mm at certain locations leaving a large void below the basement slab. Although these signs of distress by themselves may not indicate the imminent collapse of Block 3, they could well indicate the likelihood of more damage if left unattended to. Therefore, they should be repaired as soon as possible.
>
> Based on this study, the following conclusions are drawn:
>
> (1) The foundations for Blocks 2 and 3 have not been designed to resist lateral loads arising from any soil movement. However, it is not normal practice to design the foundation for a building to resist lateral loads arising out of extensive earth movement as that which occurred behind Block 1. Even if other piling systems such as driven or bored cast-in-place concrete piles had been used, the above conclusion would still be valid for large lateral movements such as movements arising from land slides.
>
> (2) Tests conducted by the inquiry committee on specimens of rail piles extracted from Block 1 showed that the rails had comparable strength to that indicated in the technical brochure of Messrs. Wing Construction Sdn. Bhd. Hence, it is reasonable to conclude that the pile materials used for the foundations of Highland Towers Condominium are of acceptable quality.
>
> (3) With the available information, it is not possible to conclude that the piles are inadequate to support the building loads for both Blocks 2 and 3, considering the fact that the buildings have been standing for several years with no visible signs of distress.
>
> (4) The existing drainage in the hillslopes is inadequate to cope with the increase in runoff resulting from the clearing of vegetation.

(5) Shallow landslides on the hillslopes directly behind Blocks 2 and 3 (Lots 3635, 3636, 3637, 3638, 3639, 3640, 3655, 3656 and 3657) can easily be triggered off with the rise in phreatic surface as a result of heavy rainfall coupled with inadequacy of the existing surface drainage. If the stability of the present slopes is not improved, such shallow slides may lead to progressive slides processing downhill similar to the failure of the slopes behind Block 1; this could result in serious consequences to the stability of the blocks, especially Block 3 which is nearer to the slopes.

(6) The risk of any failure on the hillslope arising from water movements, barring other external factors, would be minimal should the natural drainage flow path be maintained in its original route.

(7) Actual dimensions of the rubble retaining walls constructed close to the buildings as well as in the hillslopes are unknown. However, most of the retaining walls fail by overturning if the sizes as scaled from the cross sections profiles such as Fig. 2.1 (inquiry committee report) are used. In view of the inadequacy of the rubble retaining walls on Lots 3635, 3636, 3637, 3638, 3639, 3640, 3655, 3656, 3657, 3641, 3642 and 3658, the stability of the hillslope is in fact not enhanced in any way by the existence of the retaining walls. On the contrary, the collapse of any terrace/level of rubble retaining wall may trigger a land slip which could process downhill into progressive slides and pose serious danger to the buildings below.

(8) Based on the above findings, it is our considered opinion that the re-occupation of the Blocks 2 and 3 in their present state is not advisable in view of many uncertainties and associated risks involved.

In their recommendations for remedial works Minconsult stated *inter alia* the following:

> The condition assessment carried out for Blocks 2 and 3 has shown that the structural integrity of the buildings is adequate. Based on the available information and the fact that Blocks 2 and 3 have been standing for several years without any visible signs of distress, it is not possible to conclude on the inadequacy of the foundations. However, the condition assessment has clearly shown that the stability of the hillslopes and the rubble retaining walls behind Blocks 2 and 3 are unsafe and pose a serious threat to the stability of the buildings. It is proposed therefore that remedial works be carried out soonest possible.
>
> Remedial works discussed herein have been divided into subsections, namely the minor structures within the property boundary and the hillslopes. Individual consideration is given to each of the areas to be rectified in order that the most economical and safest scheme can be worked out. However, as the hillslopes are outside the Highland Towers' property boundary and the consultants have no prior knowledge of the owner's intention for future land use, several schemes for remedial works on the hillslopes are proposed for discussion and further consideration.

It must be noted that some of the proposed remedial works are highly skilled operations and should be undertaken only by experienced contractors under close supervision of experienced professional engineers. Detailed designs of the remedial works are however, not within the scope of this report.

Facts of the Case

The Highland Towers Condominium comprised of 3 blocks of 14 level buildings located on lots 494, 495 and 653 of Mukim Hulu Klang within the District of Gombak in the State of Selangor and is gazetted under the local authority of MPAJ. On 11 December 1993 at approximately 1.30 p.m., Block 1 suddenly toppled over and collapsed without warning, causing the loss of 48 lives. Blocks 2 and 3 did not collapse but sustained some damage. Following the tragedy that befell Block 1, the respondent set up an investigation committee ("the Highland Towers Committee") to investigate into the collapse of the building and the safety and stability of the adjacent Blocks 2 and 3. The terms of reference of the committee are:

(1) To investigate into the causes of the collapse of Block 1, and to identify the party or parties responsible for the collapse;

(2) To make recommendations on actions that could be taken against those responsible; if any,

(3) To make recommendations on measures to prevent future recurrences of such accidents; and

(4) To make an assessment and recommendations on the fate of Blocks 2 and 3.

After completing its investigations the Highland Towers committee published its findings in a report entitled "Report of the inquiry committee into the collapse of Block 1 and the stability of Blocks 2 and 3 Highland Towers Condominium, Hulu Klang Selangor Darul Ehsan" ("the Highland Towers Committee's Report). In its report the Highland Towers committee concluded:

The most probable cause of collapse of Block 1 Highland Towers Condominium, Hulu Klang, Selangor was due to the buckling and shearing of the rail piles foundation induced by the movement of soil. This movement was caused by additional pressure from the landslide and rubble wall debris behind the block. Inadequate drainage on the hillslope had aggravated surface runoff that triggered the series of landslides.

The landslide was triggered by the following:

(i) The changes in the direction of the natural water path at the adjoining and upper portion of the slope into the existing stream behind Block 1 had resulted in the concentration of run-off water leading to the slope behind Block 1. This concentration of run-off water coupled with the inadequate

provision and lack of maintenance of the surface drainage had accelerated the flow of water and had further aggravated the stability of the slope and rubble walls.

(ii) Slope and rubble walls behind and in front of Block 1 were not designed nor their construction properly supervised. Analysis by the investigators showed that they were unstable with a safety factor of theoretically less than 1.

As to the stability of Blocks 2 and 3, Highland Towers Committee stated:

It can be deduced from the condition survey that the superstructure integrity of Blocks 2 and 3 is unaffected by the collapse of Block 1.

However, the stability of Blocks 2 and 3 is inferred unsafe for the following reasons:

i) The stability check for the factor of safety against sliding and overturning on the rubble wall in front of Block 3 is theoretically less than 1.0 which indicates that the rubble wall is unstable. Any loss of lateral restrain in the event of collapse of the rubble wall can induce a failure similar to Block 1, even in the absence of landslide occurring behind the block, Block 2 will be significantly affected because of its proximity to Block 3.

ii) The surface drainage system on the hillslope behind Blocks 2 and 3 has not been constructed in full compliance with the approved plan and not maintained accordingly by the developer/owner. Any increase in infiltration of overland flow including flow from the adjoining development area can cause a rise of ground water level under the same surface and subsurface permeability characteristics which can induce the same result as that which affected Block 1.

iii) The foundation of Blocks 2 and 3 might suffer the same inherent weaknesses as those experienced in Block 1 as the piling system for Blocks 2 and 3 is inferred to be the same as for Block 1.

iv) The planning, construction and supervision of the development of Blocks 2 and 3 were similar to those for Block 1. As there were irregularities in the submission, construction and supervision procedures related to the collapse of Block 1, it is inferred that the safety of Blocks 2 and 3 is also doubtful.

In Chapter 6 of the Highland Towers Committee's report, the committee recommends *inter alia* that:

In view of the unsafe condition of Blocks 2 and 3, a rectification proposal is required from independent consultants to be appointed by the owner pertaining to the stability of retaining wall, foundation system, slope and drainage within the time frame of 3 months from a date of notification by Majlis Perbandaran Ampang Jaya. In the event of failure to submit the proposal within the stipulated time, the Majlis will issue a notice to the owner to demolish Blocks 2 and 3.

It is noteworthy to restate here what the committee said of the surroundings (Slope, Rubble Wall and Surface Drainage) when evaluating the report of the technical committee in order to establish the probable causes contributing to the collapse of Block 1. It stated that:

> The slope and rubble walls behind and in front of Block 1 were not designed nor their construction properly supervised. The analysis of the slope and rubble walls showed that they had a factor of safety of about unity which means unsafe. A factor of safety of theoretically less than 1 means a failure.
>
> Also the inadequate provision and lack of maintenance of surface drainage had resulted in an increase of surface runoff volume to the slope behind Block 1. These had further aggravated the stability of the slope and rubble walls.

As to substructure, it stated that:

> The initial landslide immediately behind Block 1 imposed additional pressure on the soil under the building causing the rubble wall in front of the block to fail. This resulted in the failure of the rail piles foundation which buckled and sheared causing the building to move and topple.

It is noteworthy also that contrary to the recommendations of the Highland Towers Committee, the respondent issued notices to, *inter alia,* the residents of Blocks 2 and 3 directing them to either repair or demolish Blocks 2 and 3 within 3 months from the date of the notices (see Exhibits "BG1", "BG2" and "BG3" to Dr. Benjamin George's first affidavit and Exhibit "SA1" in the affidavit of Sharifah Azaliah binte Tan Sri Syed Omar Shahabudin affirmed on 22 August 1994). In addition to directing the repair or demolition of Blocks 2 and 3, the notices also directed their recipients to conduct repair works on the hillslope outside the boundary of Highland Towers.

Certiorari

I pause here to touch briefly on *certiorari.* For the sake of simplicity and brevity I will quote Professor M.P. Jain who said:

> *Certiorari* is the most commonly invoked writ in modern Administrative Law. The modern judicial trend is to expand its scope. It is the principal means of invoking judicial review over tribunals and quasi-judicial bodies which are now proliferating outside the regular judicial system. But the parameters of *certiorari* are expanding in recognition of the need to impose judicial review over administrative bodies. Today *certiorari* goes not only to a body discharging a quasi-judicial function, but to any body determining the rights of the people. The modern trend is that wherever there is power to determine questions affecting the rights of persons, there is a duty to act judicially and such a determination is subject to *certiorari.* ... In Malaysia, *certiorari* has been frequently invoked to quash the discretionary decisions of Ministers and other administrative authorities. *Certiorari* has thus emerged into a general remedy for the control of decisions by the administration affecting rights of the people. ... The function of *certiorari* is to quash. *Certiorari* is issued when the body in question has

> completed its work, disposed of the matter and given its determination; *certiorari* is thus issued to quash such a determination. ... *Certiorari* is an extraordinary and discretionary remedy with the High Court.
>
> (see his book entitled, "*Administrative Law of Malaysia & Singapore*" 2nd End., at pp. 460-461).

In the book entitled "*Applications for Judicial Review, Law and Practice of the Crown Office*" 2nd Edn., by Grahame Aldous LLB and John Alder LLB, BCL it was stated that:

> The basis of the power of the High Court to review decisions of inferior Courts, public bodies and tribunals is that it can make such bodies do their duty and stop them from doing things which they have no power to do. The High Court cannot determine whether decisions are right or wrong on their merits. The procedure under O. 53 is thus not an avenue for appeal against decisions. ... One of the main problems faced by practitioners in attempting to define the grounds for judicial review is the inconsistent terminology adopted by the Courts. ... In their need to find a shorthand definition of the grounds for judicial review, practitioners have seized upon the so-called 'Diplock Categories' from the speech of Lord Diplock in the *GCHQ* case, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. Lord Diplock categorised the ground of judicial review under three broad heads. These heads are illegality, procedural impropriety and irrationality. ... Illegality includes acting *ultra vires* the governing legislation, error of law, failing to take relevant factors into account and taking irrelevant factors into account. Procedural impropriety includes violating procedural requirements imposed by the governing legislation and also acting 'unfairly'. ... 'Fairness' may require that a person with a legitimate expectation be given a hearing. ... Irrationality is also called 'Wednesbury' unreasonableness following Lord Greene's classic statement in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* [1948] KB 223. Under this head the Courts interfere with decisions only if they are so unreasonable that no reasonable authority properly directing its mind would have made them.

The Issues

The respondent advances the following grounds why the applicants' applications should be dismissed. These grounds are:

(1) The respondent has jurisdiction under s. 83 of the Act to issue the notice and the said notice is not amenable to *certiorari.*

(2) In issuing the said notice the respondent has complied with the principles of natural justice and has not acted arbitrarily and/or improperly and/or *mala fide.*

(3) The said notice is not in breach of the Federal Constitution.

The applicants in gist raise the following issues and submit that *certiorari* would lie and that the order of *certiorari* ought to have been granted by the Court. These issues as Mr. Davidson learned Counsel for the residents put it are:

(1) The timing issue

(2) The ownership issue

(3) The trespass issue

The Timing Issue

The essential framework of s. 83 of Act is found in subsections (1), (3) and (4) of the Act. The subsections read as follows:

> (1) If after conducting such inquiry as it thinks fit, the local authority is satisfied that any building or anything affixed thereon is in a ruinous state, likely to fall or is in any way dangerous to any person therein or foot passengers on the streets adjoining such building, the local authority shall serve notice on the owner of such building requiring him to either repair the defects or demolish the building or anything affixed thereon within such period of time as the local authority may specify and the local authority may also require such owner to put up such hoarding or fences of such specifications and within such period of time as it may specify.
>
> (2) If upon service of the notice the owner desires to repair, he shall not proceed to do so unless he has obtained planning approval to do so from the relevant authority in charge of town and country planning in the area where his building is situated.
>
> (3) Where planning approval has been granted, the owner shall not proceed to repair unless he has submitted such plans and specifications showing the intended repairs and until such plans and specifications have been approved by the local authority.

Section 83(1) of the Act therefore confers a very broad discretion on a local authority by allowing it to issue a s. 83 notice after "conducting such inquiry as it thinks fit" to "satisfy" itself that a building is in a dangerous condition. A notice may require the "owner" to "either repair the defects or demolish the building within such period of time as it may specify". These powers are limited by the express words of the section conferring the power and the scope, policy and object of s. 83. In *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, 148 HRH Raja Azlan Shah Ag. CJ (as HRH then was) said, "On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to para-phrase the words of Lord Greene MR in *Associated Provincial Picture Houses, Ltd.*

v. Wednesbury Corpn., have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government,* approved in *Fawcett Properties Ltd. v. Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the Courts to intervene. The Courts are the only defence of the liberty of the subject against departmental aggression".

In *Minister of Labour, Malaysia v. Lee Seng Fatt* [1990] 2 MLJ 82, 83 Hashim Yeop A. Sani CJ (Malaya) said:

> There is no question that the power of the Minister under s. 20(3) of the Act (the Industrial Relations Act 1967) is wide and the language used by the legislature would seem to confer on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted *bona fide,* that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.

In *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] 2 WLR 924, 941, Lord Reid said:

> But if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court. So it is necessary first to construe the Act.

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1947] All ER Vol. 2 680, 682, Lord Greene MR, said:

> The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any Court of law.
>
> What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters.

In *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 AMR 1601 the Court of Appeal said:

> An inferior tribunal or other decision making authority, whether exercising a quasi judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 AMR 15:855/[1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed as Anisminic error) or if he misconstrues the terms of any relevant statute, or mis-applies or mis-states a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

In *Minister For Aboriginal Affairs and Anor. v. Peko-Wallsend Limited and Ors.* [1985-1986] 162 CLR 24, 39, Mason J said:

> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the Court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.

Professor M.P. Jain writing on Judicial Control about Irrelevant Considerations/ Leaving out Relevant Consideration in his book entitled, "*Administrative Law of Malaysia and Singapore*" 2nd Edn., said on p. 356:

> Discretion should not be guided by irrelevant considerations, i.e., the considerations lying outside the scope of the statute concerned. At times, a statute conferring discretion on an authority may itself lay down the considerations which have to be taken into account by the concerned authority for exercising its power. In such a case, if the power is exercised without taking into account these considerations, or any consideration outside those mentioned in the Act has been taken into account by the concerned authority, then its act will be invalid.

Professor H.W.R. Wade wrote on "Discretion Limited by Law" in his book entitled "*Administrative Law*" 6th Edn., on p. 388:

> The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the Courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act.

As the above citations show, it is now well established that a discretionary power to impose such conditions "as they think fit" must be exercised in good faith, for a proper purpose and after a consideration of all factors relevant to the scope, policy and object of the empowering Act. In this case a s. 83 notice can only be directed to an "owner" of a building. The term "owner" is expressly defined in s. 3 of the Act.

Learned Counsel for the applicants submitted that a s. 83 notice can only be directed to an "owner" of a building. The term "owner" is expressly defined in s. 3 of the Act. This definition provides an express limitation on the discretionary power conferred by s. 83. The express words of s. 83 require that a s. 83 notice provide a building owner with a rational choice of either repairing or demolishing his building. This requirement is clear from s. 83(1) and s. 83(3) of the Act.

By virtue of s. 83(1), a s. 83 notice must state that repairs or demolition must take place during a specified time. Clearly, the fact that a s. 83 notice must provide this option means that a building owner must be given a rational choice of either repairing or demolishing his building.

Section 83(3) speaks of the building owner's "desire" to repair, confirming that s. 83 requires that a building owner be given a rational choice of either repairing or demolishing his building. Although s. 83 appears to suggest that the time required for repair or demolition of a building is entirely at the discretion of a local authority the time specified must be reasonable and should take into account:

(i) the need to give a building owner the rational choice of either repairing or demolishing his building;

(ii) the need for planning permission and the approval of building plans as specified by ss. 83(3) and 83(4);

(iii) the scope of repair works;

Section 83(1) gives a local authority a broad discretion to conduct "such inquiry as it thinks fit."

It can be seen from this case that the respondent had set up an inquiry committee and had failed to consider the recommendations of its own Inquiry Committee i.e., the Highland Towers Committee which led it to issue the said notices that were contrary to the scope, policy and object of s. 83. The Inquiry Committee recommends that "in view of the unsafe condition of Blocks 2 and 3, a rectification proposal is required from independent consultants to be appointed by the owner pertaining to the stability of retaining wall, foundation system, slope and drainage within the time frame of 3 months from a date of notification by the respondent". "In the event of failure to submit the proposal with the stipulated time, the respondent will issue a notice to the owner to demolish Blocks 2 and 3".

Learned Counsel for the applicants submitted that in addition to the 3 months required to prepare a technical proposal alone, other factors show that time will be needed to carry out the actual repairs on Blocks 2 and 3 and the hillslope behind these buildings. The other factors are:

(a) firstly, any technical proposal to repair Blocks 2 and 3 must have the approval of the respondent and the other appropriate authorities (Sections 83(3) and (4) of the Act). The problems pertaining to Blocks 2 and 3 are not usual and the time needed to ensure that any technical proposal is acceptable will, in all probability, be longer than usual;

(b) secondly, any rectification works to resolve the Highland Towers problem must involve work on the adjoining hillslope, which lies the outside the Highland Towers boundary. The owner of this hillslope can only be persuaded to complete these works through negotiation or legal action. Either option can confidently be expected to take some time. The respondent's failure to consider these abovementioned factors must mean that these s. 83 notices are *ultra vires* and beyond the jurisdiction of the Act.

The Highland Towers Committee recommended that a technical proposal on "the stability of the retaining wall slope, foundation system, slope and drainage" be submitted within 3 months. It did not recommend that repairs or demolition be completed within 3 months. Contrary to the Highland Towers Committee's recommendation the respondent issued s. 83 notices requiring the repair or demolition of Blocks 2 and 3 and the adjoining hillslope within 3 months. The respondent advanced no reason for not following its committee's recommendations.

The respondent was required to consider the recommendations of the Highland Towers Committee as it expressly asked this committee for recommendations on the future of Blocks 2 and 3 as part of the committee's terms of reference.

The Highland Towers Committee was composed of a number of technical experts who are clearly aware of the large amount of work that would be needed to repair Blocks 2 and 3. With this knowledge in mind the committee felt that 3 months was needed to prepare a repair proposal alone. By necessary inference this committee must have realised that more time would be needed to complete repairs on Blocks 2 and 3 and the neighbouring hillslope; a responsible local authority, with a proper appreciation of its responsibilities would have studied the Highland Towers Committee's recommendations and would not have departed from them unless there was good reason to do so; the respondent advanced no reason for not following the committee's recommendation that only repair proposal be prepared within the time frame of 3 months.

Accordingly I have no hesitation in upholding the above submissions of learned Counsel for the applicants.

It is further submitted by the learned Counsel for the respondent that the notice under s. 83 is not amenable to *certiorari* on the basis that the Act provides an alternative statutory appeal procedure.

Learned Counsel for the applicants in reply submitted that a statutory appeal procedure must be a genuine appeal procedure before it can be argued that an applicant should resort to it before seeking the remedy of *certiorari.* There can be no appeal procedure where the recipient of an illegal s. 83 notice must throw himself at the mercy of the party issuing the notice in the hope that the notice will be withdrawn. A genuine statutory appeal procedure only exists where an individual is entitled by a statute to appeal from the decision-maker's decision to a higher authority seeking a reversal of the original decision.

In the case of *Government of Malaysia v. Jagdis Singh* [1987] 2 MLJ 185 (SC), the Court was concerned with an appeal procedure under the Income Tax Act 1967 from a decision of the Director General of Income Tax to the Special Commissioners of Income Tax. In the case *HSBC Corporation v. Rent Tribunal for Ulu Kinta* [1972] 1 MLJ 70 (FC) Ong Hock Sim FJ felt that the Control of Rent Act 1966 provided an appeal procedure from a decision of the Rent Tribunal to the appeal board. In the case *Badat bin Drani v. Tan Kheat* [1953] MLJ 67 the Court was concerned with an appeal procedure from the Rent Board, Raub to the High Court. In the case *Reg. v. Chief Constable, Ex Parte Calveley* [1986] 2 WLR 144 the Police (Discipline) Regulations 1977 and the Police (Appeals) Rules 1977 (S 1 1977 No. 579) provided a right of appeal from a decision of the Chief Constable to the Secretary of State.

In the light of the above cases it is clear that a statutory appeal procedure only exists if an individual is provided with an opportunity to seek a reconsideration of an original decision-maker's decision by a higher authority

or tribunal. There can be no appeal procedure if the recipient of an illegal s. 83 notice must submit himself to the mercy of the party issuing the notice in the hope that the notice will be withdrawn.

It is further submitted by the learned Counsel for the applicants that by arguing that the residents should revert to the respondent regarding the legality of s. 83 notices issued by the respondent itself, learned Counsel for the respondent is seeking to submit that it is for the respondent to decide on the legality of its own notices. This submission, it is argued, is greatly flawed as no administrative authority can be a Judge in its own cause.

But, learned Counsel for the respondent suggested that s. 83(3) and s. 83(6) of the Act provide the applicants with an opportunity to revert/rely on the respondent when seeking to comply with a s. 83 notice. But it is to be noted submitted learned Counsel for the applicants that both s. 83(3) and s. 83(6) are not appeal provisions as neither provide the recipients of notices issued under s. 83(1) with the opportunity to appeal to a higher authority against the validity of these notices. Section 83(3) assumes that a notice issued under s. 83(1) is valid when a building owner seeks planning approval before commencing repairs pursuant to the notice. It does not provide a mechanism to challenge the validity of notices issued under s. 83(1). Similarly, s. 83(6) assumes that a notice issued under s. 83(1) is valid when a building owner asks a local authority to demolish his building in order to comply with the notice. It does not provide a means to challenge the validity of notices issued under s. 83(1). The applicants in the present application seek to challenge the validity of the notices issued under s. 83(1). Neither s. 83(3) nor s. 83(6) provides them with that avenue. It is therefore clear that these provisions do not provide the applicants with an alternative statutory appeal procedure in preference to *certiorari.*

Learned Counsel for the respondent also refers to s. 91(1) of the Act and the appeal provision under s. 92(1) thereof, suggesting that their clause provisions are relevant and the applicants should seek recourse thereunder.

In reply learned Counsel for the applicants submitted that ss. 91 and 92 must be read together and that s. 91 provides that a local authority may seek a mandatory order from a Magistrate's Court to enforce any notice issued under the Act. Thus, in the present case, the respondent may seek a "mandatory order" to enforce a s. 83 notice. Section 92 only comes into play after a Magistrates Court has issued a mandatory order. It provides an individual with a right of appeal against a mandatory order issued by the Magistrates Court. There is no right of appeal unless a mandatory order is in existence. Hence, it is clear that the right of appeal in ss. 91 and 92 arises only against a mandatory order made by a Magistrate's Court and not a notice issued by a local authority under the Act.

Thus, in the present case ss. 91 and 92 of the Act do not provide a statutory appeal procedure against the respondent's s. 83 notices.

It should be noted that the statutory appeal procedure provided by s. 91 and s. 92 of the Act is totally dependent on the respondent seeking a mandatory order under s. 91. This means that the recipients of s. 83 notices do not have an unfettered choice in using the appeal provisions of s. 92. Their choice is dependent on the respondent seeking a mandatory order. A statutory appeal procedure cannot be a genuine appeal procedure if it is first dependent on a decision-maker seeking to enforce his original decision.

The facts of the present case show that it is unrealistic to treat ss. 91 and 92 as appeal provisions as the recipients of illegal s. 83 notices in this case have 6 weeks to seek orders for *certiorari* against these notices (O. 53 r. 1A of the RHC). Any delay beyond this time limit must be accounted for to the satisfaction of the Court. If the delay is not explained, a Court will not have any jurisdiction to deal with the application (*Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1983] 2 MLJ 54). If the recipients of illegal s. 83 notices are obliged to wait until the respondent obtains a mandatory order under s. 91, their right to seek orders for *certiorari* may lapse with time. The recipients of illegal s. 83 notices may be placed in an even less satisfactory position; they may wait more than six weeks for the respondent to seek a mandatory order in vain. If the respondent refrains from seeking a mandatory order pursuant to s. 91 the recipients of illegal s. 83 notices would have lost their right to *certiorari* as well as hope for an appeal *via* s. 92 of the Act.

I am in full agreement with learned Counsel for the applicants that the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave. In *Haji Laugan Tarki bin Mohd. Noor v. Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85, SC Hashim Yeop A Sani SCJ (as he then was) said at p. 87:

> It would seem beyond question that it is now settled law that it is not an inflexible rule that where there is an appeal provision however elaborate in the relevant statute (which an aggrieved person can take advantage of), leave for an order of *certiorari* should automatically be refused. It was held in *Government of Malaysia v. Jagdish Singh* that the Court has a discretion to issue an order of *certiorari* if it can be shown that there is a lack of jurisdiction or there is a blatant failure to perform some statutory duty or there is a breach of natural justice. Therefore, the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave.
>
> The underlying principle should always be remembered that the jurisdiction of the High Court to grant an order of *certiorari* is supervisory in character and is exercisable over all inferior tribunals.

I uphold the submission of learned Counsel for the applicants that in the present case, it is wrong to argue that s. 83(3) and s. 83(6) of the Act provide the applicants with an appeal procedure where the s. 83 notices are invalid. Both s. 83(3) and s. 83(6) are dependent for their operation on the validity of notices issued under s. 83(1). If the notices issued under s. 83(1) are invalid, there can be no resort to s. 83(3) and s. 83(6). Likewise if a notice issued under s. 83 is invalid a Magistrate's Court cannot issue a mandatory order under s. 91 to enforce it. It therefore follows that the procedure under s. 92 cannot operate.

Let us now see the grounds relied upon by the respondent in issuing the said notice. As to ground (a) learned Counsel for the applicants submitted that ground (a) does not state that either Block 2 or 3 "in a ruinous state, likely to fall or is in any way dangerous ..." as it relates merely to the instability of the rubble wall which is expressed to be merely theoretical. Besides the rubble wall is not physically connected with either Block 2 or 3. As to ground (b) learned Counsel for the applicants submitted that, the drainage for the hillslope behind Blocks 2 and 3 was not built by the Highland Properties Sdn. Bhd., because the land there was never developed by the Highland Properties Sdn. Bhd., as originally intended. The drainage plan for the hillslope was in relation to the development originally intended by the Highland Properties Sdn. Bhd., but which were never materialised. This is not denied by the respondent. (See para. 10 of Yap's affidavit at p. 39 of the applicant's Bundle of Cause Papers).

The hillslope behind Blocks 2 and 3 does not now or at the material time belong to the Highland Properties Sdn. Bhd. They were sold to Arab Malaysian Finance Berhad on or about 27 May 1991. This is also not denied by the respondent. Since 1991, there has been no question of the applicant maintaining or improving the condition of the said hillslope. That responsibility, clearly, must legally be upon the owner of the hillslope. (See paras. 11 and 12 of Yap's affidavit at p. 39 of the applicant's Bundle of Cause Papers. And also see the sale and purchase agreement between the applicant and Arab Malaysian Finance Berhad for the sale of the land (including the hillslope). Exhibit YKK3 of Yap's affidavit at p. 64 of the applicant's Bundle of Cause Papers.)

Again, this is not evidence that the buildings, Blocks 2 and 3 are themselves unsafe. It is in fact the condition of the hillslope, which is owned by someone else, that is unsafe - on the ground that there is inadequate drainage. Notice should therefore in fact be given to the owner of the hillslope, which is Arab Malaysian Finance Berhad, to abate any nuisance caused by their hillslope, under s. 88 of the Act.

As to ground (c) learned Counsel for the applicants submitted that the fact that the foundation system of Block 1 has shown weaknesses in terms of (i) - (v) does not necessarily mean the foundation system of Blocks 2 and 3 are

unsafe. As to (d) learned Counsel for the applicant submitted that reference is made not to the planning, construction and supervision of Blocks 2 and 3 but to those of Block 1 and the lack of safety is merely inferred from the irregularities in the submission, construction and supervision procedures of Block 1. The certificate of fitness for Block 1 was given on 27 October 1978, the certificate of fitness for Block 2 was given on 6 November 1981 and the certificate of fitness for Block 3 was given on 24 May 1986.

The 3 Blocks were not certified fit at the same time. They were considered separately.

(See Exhibit YKK8 of Yap's affidavit in pp. 137, 138 and 139 of the applicant's Bundle of Cause Papers for the certificates of fitness).

The safety of Blocks 2 and 3 is merely expressed to be "doubtful".

I uphold the submissions of Counsel for the applicants.

It is further submitted by the applicants that the s. 83 notices are impossible to comply with and are unreasonable in law. It is submitted by the learned Counsel for the applicants that, a local authority like the respondent having had the benefit of the Highland Towers Committee's report would have realised that 3 months was a wholly inadequate time period to carry out rectification or demolition works. The committee recognised that a minimum period of 3 months was needed for a proposal to repair the buildings. The view that it was only possible to complete a technical proposal in 3 months was confirmed by the residents' own experts.

The respondent has failed to apply its own committee's recommendations and demanded the impossible of recipients of s. 83 notices. As such the s. 83 notices amounted to "an illogicality in, or misapplication of, the reasoning adopted by the decision-maker so that the factual result is perverse, by the decision-maker's own criteria". (See *Taveli and Ors. v. Minister of Immigration* [1986] 86 ALR 435, 453).

A local authority like the respondent having had the benefit of the Highland Towers Committee's report would have recognised that:

(i) A major part of the danger to the two buildings emanates from the hillslope;

(ii) the building owners do not own the hillslope;

(iii) without repair work being done on the hillslope any repairs to Blocks 2 and 3 in isolation would be of no use as the danger posed by the hillside would remain unremedied. The hillside must be repaired first before any works to the buildings can be conducted. Only if works to the hillside are completed will the owners of the buildings have a rational choice of repairing or demolishing the buildings, in line with the policy of s. 83.

In short, the hillside must be stabilised first before any repair work on the two blocks can be contemplated. The stabilisation of the hillslope is a crucial factor that must be fully implemented before the owner of Blocks 2 and 3 can be given a rational choice of repairing or demolishing these buildings in line with the policy of the Act. The respondent has not given adequate weight to the responsibility of the hillslope owners to avert danger in the present case. Unreasonableness can be used to "set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance or has given excessive weight to a factor of no great importance". (See *Peko Wallsend* [1986] 162 CLR 24, 41).

It should be noted that s. 3 of the Act defines "building" as including walls. There are walls on the hillslope behind Highland Towers. These walls are "buildings". The notices in the present case set out the flaws in these walls and conclude with the requirement that the recipients are "required to repair the defects of the said building or to demolish them ...". In effect these notices require their recipients to trespass on neighbouring land. In addition to this, these notices require an apartment "owner" to trespass on neighbouring apartments.

Again I have no hesitation in upholding the submission of Counsel for the applicants. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* [1947] 2 All ER 680, Lord Greene MR said at p. 683:

> Theoretically it is true to say - and in practice it may operate in some cases - that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere. That, I think, is right, but that would require overwhelming proof.

In *Minister for Aboriginal Affairs and Anor. v. Peko-Wallsend Limited and Ors.* [1985-1986] 162 CLR, 24, Mason J said at p. 41:

> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power: *Sean Investments Pty. Ltd. v. MacKellar* (42); *Reg v. Anderson; Ex parte Ipec-Air Pty. Ltd.*(43); *Elliot v. Southwark London Borough Council* (44); *Pickwell v. Camden London Borough Council* (45). I say "generally" because both principle and authority indicate that in some circumstances a Court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation* (46), in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.

In this case, I am of the opinion that it is impossible to comply with the s. 83 notices because not only are they unreasonable for being irrational to expect the applicants to do repairs to neighbouring apartments and the hillslopes which they do not own but also in the process of compliance expecting the applicants to commit a trespass which is an illegality. In the circumstances, the decision to issue the s. 83 notice by the respondent is so unreasonable or perverse that according to Lord Greene that it is "one that no reasonable body could have come to. It is not what the Court considers reasonable".

Learned Counsel for the applicants further submitted that the residents of Highland Towers should be given the opportunity of presenting their case on its merits in the sense that the respondent should have followed the recommendations made by the Highland Towers Committee on the future of Blocks 2 and 3. It was publicly announced that an inquiry committee would be set up to investigate all aspects of the Highland Towers tragedy. To this end the Highland Towers Committee was in fact set up. When that Highland Towers Committee's report was published it was made public. This created an impression in the public mind that the respondent would follow the recommendations of its committee. All these created a legitimate expectation among the residents of Blocks 2 and 3 that the findings of the Highland Towers Committee would be followed unless there were in existence good reasons for not doing so.

The respondent has provided no reasons or explanation for not following the Highland Towers Committee's recommendations that only a technical proposal be completed within 3 months. It is further submitted that this amounts to a breach of legitimate expectation without good reasons and therefore added learned Counsel for the applicants, that this must mean that the s. 83 notices have been issued *ultra vires* and beyond any jurisdiction conferred by the Act.

What is the doctrine of legitimate expectation? In *Attorney General of Hong Kong v. Ng Yuen Shin* [1983] 2 WLR 735, Lord Fraser of Tullybelton said:

> The narrower proposition for which the applicant contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has "a legitimate expectation" of being accorded such a hearing. The phrase "legitimate expectation" in this context originated in the judgment of Lord Denning MR in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170. It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v. Mackellar* (No. 2) [1977] 137 CLR 396, 404, Barwick CJ construed the word "legitimate" in that phrase as expressing the concept of "entitlement or recognition by law". So understood, the expression (as Barwick CJ rightly observed) "adds little, if anything, to the concept of a right." With great respect to Barwick CJ, their Lordships consider that the word "legitimate" in that expression falls to be read as meaning "reasonable." Accordingly "legitimate expectations" in this context are capable of including expectations which go

beyond enforceable legal rights, provided they have some reasonable basis: see *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864. So it was held in *Reg. v. Board of Visitors of Hull Prison, Ex Parte St. Germain (No. 2)* [1979] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence although he has no legal right to remission, but only a reasonable expectation of receiving it.

...

The expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

...

The jurisdiction for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.

In *Dr. Amir Hussein bin Baharuddin v. Universiti Sains Malaysia* [1989] 3 MLJ 298 it was held that "(7) The closest the Courts have come to explaining the idea of 'legitimacy' is that the expectation must be reasonable, although reference has also been made to 'well-founded', 'settled', 'natural' or 'real'. Reasonableness connotes that the expectation must be objectively justified - a subjective hope is not enough". However, in the *Council of Civil Service Union* case, the use of the word reasonable has been discouraged, chiefly because some expectations, although they might well be entertained by reasonable persons, will not necessarily have consequences to which effect will be given in public law. Further, the possibility that there may be some reasonable expectations which are not 'legitimate', has emerged with the extension of the concept of legitimate expectation into areas, other than procedural fairness, for example, standing to bring an application for judicial review.

Professor M.P. Jain wrote:

The proposition is now well established that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has a 'legitimate expectation' of being accorded such a hearing. "Legitimate expectation" includes expectations which go beyond enforceable legal rights, provided they have some reasonable basis. Expectations may be based upon some express statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, or from the existence of a regular practice which the claimant can reasonably expect to continue.

(See his book "*Administrative Law of Malaysia and Singapore*" 2nd Edn., at p. 223).

Therefore, in this case I am of the view that the residents of Highland Towers have a legitimate expectation that the recommendation of the Highland Towers Committee would be followed by the respondent before the issuance of the s. 83 notices to the applicants. The failure on the part of the respondent to do this must mean that the s. 83 notices have been issued *ultra vires* and beyond the jurisdiction conferred by the Act. In this case fairness requires the applicants with a legitimate expectation be given a hearing.

(2) The Trespass Issue

It is submitted by the learned Counsel for the applicants that s. 83 notices are beyond the powers of the Act as they require their recipients to trespass on neighbouring property. In other words they require their recipients to do work on adjoining property not belonging to them.

The definition of "building" under s. 3 of the Act includes any structures connected to them. The terraced hillside immediately behind and outside the Highland Towers boundary consists of rubble walls and a series of drains that form an elaborate, if ineffectual, drainage system. These structures are "buildings" for the purposes of the Act. The majority of these walls and drains lie outside the boundaries of Highland Towers.

These walls and drains which are outside the boundary of Highland Towers are defined as "buildings" under the Act. With this definition in mind, we must now refer to the s. 83 notices issued by the respondent to the applicants and other residents of Blocks 2 and 3. Paragraphs (a) to (d) of these notices refer to various defects in Highland Towers and its surroundings. Paragraph (b) refers to the defects in the surface drainage system on the hillslope behind Blocks 2 and 3.

The penultimate paragraph in these notices is in the following form:

> You are hereby required to repair the defects of the said building or demolish them or anything affixed thereon within three (3) months from the date of this notice.

It is clear that these notices require its recipients to repair or demolish the defects appearing in the "buildings" referred to in paras. (a) to (d) within 3 months. Among the "buildings" the recipients of these notices are directed to repair or demolish is the surface drainage system on the hillslope behind Highland Towers consisting of the series of rubble walls and drains which stand outside the Highland Towers boundary. The s. 83 notices in effect require its recipients to trespass on adjoining property in order to conduct rectification work. There is no power in s. 83 allowing a local authority to order an

individual to conduct work on property not belonging to him. There is furthermore no power in s. 83 allowing a local authority to order an individual to trespass on neighbouring property.

Further it is submitted by learned Counsel for the applicants that the respondent has acted *ultra vires* and beyond the jurisdiction of s. 83 by failing to note that the Highland Towers problem consists of faults in a number of buildings only some of which lie within the Highland Towers boundary.

The s. 83 notices issued by the respondent to the applicants and other residents of Highland Towers point out that the danger to Blocks 2 and 3 emanates from two sources:

(a) firstly, the defects to the "buildings" comprising the drainage system on the hillslope;

(b) secondly, defects in structures within the Highland Towers boundary.

In short the Highland Towers problem consists of defects to the hillslope outside the Highland Towers boundary as well as structures within the Highland Towers boundary.

The defects on the hillslope behind Highland Towers pose a direct danger to the "buildings" within the Highland Towers boundary. According to the residents' technical experts the danger posed by the hillslope must be dealt with before or simultaneously with any repairs that may take place within the Highland Towers boundary (see Exhibits MPR1 and MPR2 in the affidavit of Michael Patrick Rickard affirmed on 23 June 1995). This assessment of the Highland Towers problem is reflected in Chapters 4 and 6 of the Highland Towers Committee's report (which appears in Dr. George's first affidavit as Exhibits "BG5" and "BG6" respectively). In Chapter 4, the Highland Towers Commitee's report points to the dangers posed by the hillslope. Chapter 6 recommends that a repair proposal, the scope of which includes remedial works to this hillslope be prepared. Clearly the Highland Towers Commitee was of the opinion that the Highland Towers problem could not be resolved without works being conducted on the hillslope behind Highland Towers.

It is further submitted that s. 83 never envisaged a situation where the danger posed to a building arises as a result of a factor beyond the building's boundaries. A building owner has no legal right to do work beyond his property boundary. He cannot therefore be asked to eliminate any danger emanating from beyond his property boundary. The express words of s. 83 require that a building owner be given a rational choice of either repairing or demolishing his building. There can be no rational choice where the danger to the building emanates from beyond the building's boundaries.

Any works to Blocks 2 and 3 alone will not eliminate the danger posed by the Highland Towers problem. The danger posed by the hillside must be eliminated before or simultaneously with any repair work proceeding within the Highland Towers boundary. Only then can the owners of Blocks 2 and 3 be given the rational choice of either repairing or demolishing their buildings.

Without the works on the hillslope being completed the owners of Blocks 2 and 3 cannot have a rational choice of either repairing or demolishing their buildings. Anything that is done within the Highland Towers boundary with the hillslope remaining in an unstable condition would be of no effect.

I uphold the submission abovementioned.

Learned Counsel for Highland Properties Sdn. Bhd. submitted that major problems and perverse consequences would arise if the same notice "to repair or demolish" is issued to several persons i.e., either the apartment owners or Highland Properties Sdn. Bhd. A chaotic situation will only ensue if individual apartment owners are asked to repair or demolish their individual apartments. In such a situation one apartment owner may decide to demolish his apartment in compliance with his s. 83 notice whereas another apartment owner may decide not to demolish his apartment. Learned Counsel for the residents submitted that such a situation can be avoided if only one s. 83 notice is issued. Such a notice must be directed to the developer as registered proprietor of the land. The developer must act in accordance with the views of the majority of apartment purchasers by reason of the "two way relationship" which exists by virtue of the sale and purchase agreements between the developer and apartment purchasers. I agree with learned Counsel for the residents' submission.

The Ownership Issue

In answer to the ground advanced by the respondent that it has complied with the principles of natural justice and further that in issuing the notice, the respondent has not acted arbitrarily and/or improperly and/or *mala fide* learned Counsel for the applicants submitted that the respondent has acted beyond the jurisdiction of s. 83 by issuing notices to the residents of Highland Towers who are not the owners of Blocks 2 and 3 for the purposes of the Act and even if the residents of Highland Towers are "owners" of Blocks 2 and 3 for the purposes of the Act, the s. 83 notices are still *ultra vires* the Act as they were not issued to all "owners" of these buildings. For this reason the s. 83 notices also violate Art. 8 of the Federal Constitution which the respondent is saying it is not in breach of.

Under the Act "owner" means:

(a) the registered proprietor of the land;

(b) the lessee of a lease including a sub-lessee of the land whether registered or not;

(c) the agent or trustee of any of the owners described in paras. (a) and (b) of this definition if in the opinion of a local authority any of those persons cannot be traced or, if any of those persons has died, his legal personal representative;

(d) the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant.

and "person" includes a company, a partnership, a body of persons and a corporation sole.

Learned Counsel for the respondent submitted that definition (c) has relevance to the applicants and other residents of Highland Towers. In reply Counsel for the applicants submitted that that is incorrect as the applicants and other residents of Highland Towers are not agents or trustees of the registered proprietor of the land on which Blocks 2 and 3 stand nor are they agents or trustees of any lessee or sub-lessee of the land in question. In reply to a submission by learned Counsel for the respondent that the respondent has a broad discretion to serve a s. 83 notice on an owner or occupier of a building with reference to s. 120(3) of the Act, it is submitted by Counsel for the applicants that s. 120(3) is a provision dealing with the manner of service of notices issued under other sections of the Act which must satisfy the legal requirements of those sections. It is further submitted by Counsel for the applicants that s. 120(3) cannot confer jurisdiction to issue s. 83 notices to occupiers of buildings where s. 83 itself does not confer that jurisdiction.

I am of the view that s. 120 of the Act deals with service of notices under the Act and subsection (3) is merely a general section that it is deemed properly addressed if it is addressed by the description of the "owner" or "occupier" of such premises.

It is noted here that strata titles have not been issued with respect to Highland Towers. The registered proprietor of the land on which Blocks 2 and 3 stand is Highland Properties Sdn. Bhd. (See paras. 5 and 13(b)(ii) of Dr. George's first affidavit). It is submitted by learned Counsel for the applicants that, firstly, an apartment purchaser is only entitled to receive rent from his apartment. He cannot receive rent from his neighbours' apartments. He cannot, therefore, be ordered to repair or demolish his neighbours' apartments. To require him to carry out work on neighbouring apartments would in effect amount to requiring him to trespass on neighbouring land. This would be illegal and

contrary to the scope of s. 83, which does not provide jurisdiction to order an individual to do work on property not belonging to him. Secondly, many areas in a building are "common property". No individual can receive rent from common property (see s. 34(b) of the Strata Titles Act 1985 which "codifies" an apartment owner's right with respect to common property within a building. It should be noted that the s. 83 notices in the present case require repair work to be done on the hillslope outside the Highland Towers boundary as well as the areas constituting the common property of Blocks 2 and 3 (e.g., the foundations, the retaining wall at the front of Block 3). No works are required by these notices inside individual apartments. Therefore it must follow that a s. 83 notice can only be served on the "registered proprietor of the land" in accordance with the definition of "owner" set out above. It is not anomalous or contradictory that Highland Properties Sdn. Bhd., as registered proprietor of the land, is the only party who can be served with a s. 83 notice although it has sold the apartments in Blocks 2 and 3.

Before the issuance of strata titles, the developer remains the registered proprietor of the land on which an apartment block stands. Registration under s. 340 of the National Land Code 1965 (NLC) confers an indefeasible title to the developer. However s. 206(3) and s. 340(4)(b) of NLC preserve the *in personam* rights (contractual or equitable) existing between the developer and the purchaser of an apartment by virtue of the sale and purchase agreement for an apartment entered into by the parties. In *Kuching Plaza Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd.* [1991] 3 MLJ 163, 168, the Court said:

> In *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.*, Syed Agil Barakbah SCJ in distinguishing the registered interest in the National Land Code 1965 and the equitable interest land observed at p. 463:
>
> > It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interest in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *in personam*, i.e., he acquires the right to the land as against the vendor personally but not good against the whole world.

Learned Counsel for the applicants further submitted, that the sale and purchase agreement between the developer and an apartment purchaser is a "two way relationship". Express and implied obligations are imposed on both the developer

and apartment purchaser by virtue of this relationship. This "two way relationship" must be applied to the facts existing in the Highland Towers situation.

The developer, as registered proprietor of the land on which Blocks 2 and 3 stand, is the only party who may be served with a s. 83 notice. The developer bears the primary and sole responsibility of complying with this notice. In complying with this notice the developer may call upon any rights it may have by virtue of the "two way relationship" existing between itself and apartment purchasers. These rights may allow it to claim some form of contribution from these apartment purchasers when complying with a s. 83 notice. It must be stressed at this juncture that the developer cannot deal with a s. 83 notice in any manner it pleases. In accordance with the *in personam* (contractual and equitable) relationship with the apartment purchasers, the developer must canvass their views before deciding how to deal with such a notice. It must implement the views of apartment purchasers when dealing with a s. 83 notice.

It was further submitted that the situation that would prevail if strata titles existed with respect to Blocks 2 and 3 would not be radically different. In essence the developer would be replaced by a management corporation. The title to the lot on which Highland Towers stands would be vested in this body by virtue of s. 42 of the Strata Titles Act 1985. The s. 83 notice requiring work to the common property and buildings would be directed to this body as registered proprietor of the land on which the buildings stand. Section 43(g) of the Strata Titles Act 1985 requires the management corporation to comply with statutory notices served on it. In complying with a s. 83 notice, the management corporation may seek contributions from various apartment purchasers by virtue of, *inter alia*, s. 52 of the Strata Titles Act 1985. The management corporation must take into account the apartment purchasers' views in accordance with s. 39 and the Second Schedule of the Strata Titles Act 1985.

It may be noted from the above discussion that the developer is, in essence, in the position of the management corporation in the absence of strata titles.

Hence the apartment purchasers are not the "owners" of these buildings for the purposes of the Act. The apartment purchasers have no legal right to deal with neighbouring apartments or the common property of Blocks 2 and 3.

By requiring persons other than the developer to repair or demolish Blocks 2 and 3 the respondent has exceeded the jurisdiction of s. 83 as the developer is the only party capable of being the "owner" of these buildings for the purposes of the Act.

A further factor illustrating unfairness and inconsistency stems from the fact that many individuals who purchased apartments in Highland Towers took out loans from financial institutions to assist their purchase. A condition of these

loans required these individuals to assign their rights under their sale and purchase agreements to these financial institutions pending the repayment of the loans granted by these institutions. The effect of these assignments is that these financial institutions acquire all the rights, title and interest of the purchasers of the apartments for the time being pending repayment of the loans.

If there is any jurisdiction to serve s. 83 notices on apartment "owners", notices should have been served on these financial institutions as well. The respondent's failure to serve s. 83 notices on these bodies has meant that the burden of repairing Blocks 2 and 3 has been imposed on some but not all apartment "owners". This amounts to an inconsistent and unfair exercise of discretionary power. This inconsistency and unfairness is a further reason underlining the fact that the s. 83 notices in the present case are *ultra vires* and beyond the jurisdiction of s. 83.

I have no hesitation in upholding the lengthy submissions of Counsel for the applicants on this matter although I am not prepared at this juncture to hold the financial institutions as "owners" for the purposes of the Act. In the light of those submissions I have come to the conclusion that in the absence of strata titles being issued to the various purchasers of Highland Towers, I hold the applicant, Highland Properties Sdn. Bhd., as developer of Highland Towers as the "owner" of Blocks 2 and 3 for the purposes of the Act. Therefore the s. 83 notices must be directed to the registered proprietor of Blocks 2 and 3 who has a duty to implement the views of the apartment purchasers who in turn by virtue of the express and implied obligations imposed in the sale and purchase agreements between the developer and the apartment purchasers may have to make contributions to comply with the s. 83 notices. I also conclude that a s. 83 notice must also be served on the financial institutions not as owners but because of the assignment of rights under the sale and purchase agreements to them as a condition of they giving loan to the apartment purchasers.

In *Chung Khiaw Bank Ltd. v. Hipparion (M) Sdn. Bhd.*, [1988] 2 MLJ 62, 63-64, Edgar Joseph Jr. J (as he then was) summed up the legal position thus:

> The defendant's right to possession of the property *vis-a-vis* the developer is an incident of his rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment. Thereafter, the defendant's right to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff.
>
> (This decision was affirmed on appeal [1989] 2 MLJ 149).

The effect of the assignment therefore is that the said financial institutions should have all the rights, title and interest of the assignor for the time being in the sale and purchase agreement pending the repayment of the loan granted to the various apartment purchasers. As rightly submitted by the learned Counsel for the applicants that the individual who purchased the apartment becomes a mere contractual licensee of the financial institution pending the repayment of the loan.

Continuing with his submissions learned Counsel for the applicants further submitted that even assuming that the purchasers of apartments in the Highland Towers are "owners" for the purposes of the Act, the s. 83 notices are still beyond the jurisdiction of the Act and are bad in law. This is because the s. 83 notices in effect require a resident of one apartment to trespass on a neighbouring apartment. This is clearly illegal and contrary to the scope of s. 83 which does not provide a "person" within the meaning of s. 3 of the Act to do work on the property belonging to another. It is more so when the said notices are grounded *inter alia* on the fact that the surface drainage system on the hillslope behind Blocks 2 and 3 has not been constructed in full compliance with the approved plan and not maintained accordingly by the developer/owner and accordingly when the said notices were not issued to all apartment owners of Blocks 2 and 3 to ensure that the obligation to repair or demolish Blocks 2 and 3 is imposed uniformly and equally, the said notices become *ultra vires* and beyond the jurisdiction of s. 83 for inconsistency and unfairness. As Goff LJ said, "It is of the utmost importance that statutory tribunals should be consistent". (See *HTY Ltd. v. Vince Commission* [1976] 1 CR 169, 195). It is also submitted by learned Counsel for the applicants which submission I hereby uphold that by issuing the said notices to only some but not to all apartment "owners", it amounts to a violation of Art. 8(1) of the Federal Constitution. Article 8(1) reads, "All persons are equal before the law and entitled to the equal protection of the law". In a book entitled "*Constitutional Law in Malaysia and Singapore"* by Kevin Tan, Yeo Tiong Min and Lee Kiat Seng, it is stated that:

> When we say that we should be treated equally under the law this does not mean that all people should be treated alike. We are all different personalities, and we can be distinguished by our habits, culture and abilities. All that the law requires is that like persons in like circumstances should be treated alike. It would be ridiculous to treat a child in the same manner as an adult when it comes to something like criminal culpability. The law recognises these differences and has developed the doctrine of classification. Under this doctrine, every person in a particular class should be treated alike, so that no person is singled out for discriminatory treatment.

In *Shri Ram Krishna Dalmia & Ors. v. Shri Justice SR Tendolkar & Ors.* AIR [1961] SC 1602 (Supreme Court, India), this doctrine is explained thus:

> In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

In *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155, 166 Suffian LP said:

> The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our Courts, which he argues has not been done, it may be accepted subject to the modification that the Courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our Courts, subject to what we said in para. 6 above. We adhere to what was said in *PP v. Khong Teng Khen* at p. 170:
>
> > The principle underlying Art. 8 is that a law must operate alike on all persons **under like circumstances,** not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation'. *Kedar Nath v. State of West Bengal* AIR [1953] SC 404, 406.
> >
> > ...
> >
> > All that Art. 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.
> >
> > As regards the narrower question whether or not the Courts should leave it to the Legislature alone to go into the reasonableness of the classification, we think that the Court should not, that in other words the Court should consider the reasonableness of the classification.

Professor M.P. Jain stated in his book *"Administrative Law of Malaysia and Singapore"* 2nd Edn., that another use of Art. 8 can be to check discrimination in administration; the law may be good but there may be discrimination in its actual implementation. This will infringe the equality clause (p. 338).

Contravention of Art. 13(1) of the Federal Constitution

It is also submitted by learned Counsel for the applicants that s. 83 notices are unconstitutional as they attempt to deprive the residents of property without due compliance with the requirements of the law. Learned Counsel for the respondent cited the case of *Arumugam Pillai v. Government of Malaya* [1975] 2 MLJ 29, 30 as authority for the proposition that a law enacted by a

competent Legislature does not contravene Art. 13 regardless of its arbitrariness which learned Counsel for the applicants is in total agreement. What learned Counsel for the applicants is saying is that the respondent's action in issuing s. 83 notices in this case does not comply with the express and implied requirements of the Act. Therefore the said notices have not been issued "in accordance with law". It is submitted that the s. 83 notices have the potential of depriving the residents of Highland Towers of their properties (apartments) as Blocks 2 and 3 may be demolished as a result of these illegal notices thereby violating Art. 13.

Article 13(1) of the Federal Constitution requires that "No person shall be deprived of property save in accordance with law". In *Government of Malaya & Anor. v. Selangor Pilot Association* [1977] 1 MLJ 133 at 135 it was stated that:

> Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the word "deprived" in Art. 13(1) if it meant and only meant acquisition or use when those words are used in Art. 13(2). Great care is usually taken in the drafting of Constitutions.

Learned Counsel for the applicants submitted that, the power under s. 83 may be exercised to deprive a building owner of the right to use and enjoy his property as a building may be demolished if the terms of a s. 83 notice are not complied with (see the broad powers conferred on a local authority by s. 83(8). It is therefore essential that the terms of a s. 83 notice adhere to the express and implied requirements of the section to ensure that any potential deprivation of property only takes place "in accordance with law". Hence, if a local authority seeks to issue or enforce a s. 83 notice that fails to comply with the express or implied limitations on the statutory discretion in s. 83, its actions will violate Art. 13(1) of the Federal Constitution as well as be *ultra vires* and beyond the jurisdiction of the Act.

In this case there has been a clear failure to comply with the express and implied requirements of s. 83. The s. 83 notices have the potential of depriving the residents of the use of Blocks 2 and 3 as the buildings may be demolished if s. 83 notices are not complied with.

It is further submitted that a s. 83 notice that would comply with the requirements of Art. 13(1) must fulfil the following requirements: (a) it must be correctly addressed to the "owner" of Blocks 2 and 3 as defined by s. 3 of the Act. The "owner" of these buildings for the purposes of the Act is the developer of Highland Towers, i.e., Highland Properties Sdn. Bhd. The developer must comply with a s. 83 notice in accordance with the wishes of apartment purchasers; (b) it must give its recipient a rational choice of either repairing or demolishing Blocks 2 and 3. To this end: (i) the hillslope behind

Blocks 2 and 3 must be stabilised before any works can be carried out on Blocks 2 and 3. With the hillslope in an unstable condition any works on Blocks 2 and 3 would be a futile exercise. (ii) the s. 83 notice must specify a reasonable time to enable planning approval of repair plans and works on Blocks 2 and 3 to be carried out.

I have no hesitation in upholding the above submission of Counsel for the applicants.

In conclusion I must say that I have upheld most of the submissions put forward by learned Counsel for the applicants. This is due to the fact that learned Counsel for the respondent has failed to address the bulk of the arguments raised by the applicants in their submissions. Therefore those points raised in the applicants' submissions plus the affidavits evidence in support of them remain unrebutted and unrefuted. Learned Counsel for the respondent only addresses, albeit briefly, the issues in connection with who are the owners of Blocks 2 and 3 for the purposes of the Act and the constitutionality of the s. 83 notice. It is not sufficient as submitted by Counsel for the applicants for the said learned Counsel for the respondent to argue that the s. 83 notices are valid simply because the inquiry committee satisfied the requirements of natural justice. The inquiry committee's proceedings and the s. 83 notices must both satisfy the requirements of law. The validity of the s. 83 notices is not ensured simply because it is argued that the inquiry committee's proceedings and report are in accordance with law. The s. 83 notices must satisfy the requirements of law independently of the inquiry committee's proceedings. It must be noted that the applicants do not challenge the validity of the respondent's inquiry committee's proceeding in preparing their report. The applicants challenge the validity of s. 83 notices issued after the inquiry committee concluded its proceedings and report.

I am of the view that in this case the issuance of a s. 83 notice under the Act is not the solution. It is no use strengthening Blocks 2 and 3 unless the hillslope is strengthened as well. One must remember that this is the first time in our history a 14-level building toppled over and collapsed without any warning. The Highland Towers tragedy has caused misery to a great many people.

> For the wind passeth over it, and it is gone; and the place thereof shall know it no more.
>
> (Psalm ciii. 16.)

and the tragedy:

> It is for all - all I have. He hath eaten me out of house and home.
>
> (King Henry IV Part II Act ii Sci)

It's an axiom of living that:

> The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.
>
> (*Semayue's* case, 5 Rep. 91).

Recognising the urgency of the matter in hand what I think should be done immediately is to get together the owners of the Highland Towers, the neighbouring owners of the surrounding land especially the owners of the hillslopes and their financiers, the MPAJ and the Jabatan Pengairan dan Saliran serta Jabatan Perancang Bandar dan Desa Negeri Selangor with the Kementerian Perumahan dan Kerajaan Tempatan taking a lead role in getting all the above-mentioned parties into a dialogue in the light of the respondent's Report of the Inquiry Committee into the collapse of Block 1 and the stability of Blocks 2 and 3 and the applicants' report on Condition Assessment of Blocks 2 and 3 by Minconsult Sdn. Bhd. engaged by the residents of Highland Towers.

Another thing is that this case shows as pointed out by the Inquiry Committee that MPAJ then known as Majlis Daerah Gombak did not have the qualified personnel at that time to consider, evaluate, monitor and review the progress of the project during construction nor was proper record maintained. To add to this incompetence is the Street, Drainage and Building Act 1974 which is wholly inadequate in its provisions to tackle a problem of such a nature as the Highland Towers tragedy.

I am of the opinion that it is high time that the relevant authorities responsible for the approval and construction of high-rise buildings and condominiums should seriously look into the various Acts and bye-laws pertaining to such buildings and strengthen them. As pointed out by the Inquiry Committee of the respondent that the technical staff in local authorities be strengthened with experienced and qualified professionals to process, approve and monitor development projects. The time has now come to strictly impose deterrent penalties on all defaulting parties in the approval, supervision and construction process of the building and housing industry.

For the abovementioned reasons I hereby grant an order for *certiorari* to all the applicants in the three notices of originating motion to quash the s. 83 notices issued to them on the various dates stated heretofore with costs. As I have stated previously, although I have held that Highland Properties Sdn. Bhd., as the "owner" of Blocks 2 and 3 for the purposes of the Act, I have come to the conclusion that the s. 83 notice issued to Highland Properties Sdn. Bhd. in this case is beyond the jurisdiction of the Act and is bad in law as effectively it requires Highland Properties Sdn. Bhd. to trespass on neighbouring land, when the said notice is grounded on the fact that it requires Highland Properties Sdn. Bhd. to repair the surface drainage system on the hillslope

behind Blocks 2 and 3 which it is stated by the respondent have not been constructed in full compliance with approved plan and not maintained accordingly. Moreover in the circumstances of the case the said notice requiring Highland Properties Sdn. Bhd., to carry out the repair or demolish Blocks 2 and 3 within three months from the date of the said notice is impossible to comply with and is unreasonable in law for being irrational.

Reported by Gan Peng Chiang